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No. 84-475

In the Supreme Court of the United States

OCTOBER TERM, 1984

LAUGHLIN RECREATIONAL ENTERPRISES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the landowner is entitled to interest in this straight condemnation case.

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OPINION BELOW

The order of the court of appeals (Pet. App. A2) is unreported. The district court did not issue an opinion.

JURISDICTION

The judgment of the court of appeals (Pet. App. A1) was entered on June 25, 1984, and amended on June 29, 1984 (Pet. App. A2). The petition for a writ of certiorari was filed on September 24, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 1964, Congress enacted 16 U.S.C. 460n-1 (Pub. L. No. 88-639, 78 Stat. 1039) which established the Lake Mead National Recreation Area. The boundaries of the area were identified by reference to a specified 1963 boundary map. The statute stated that: "The Secretary may accept donations of land and interests in land within the exterior

boundaries of such area, or such property may be procured by the Secretary in such manner as he shall consider to be in the public interest."

Petitioner began purchasing the land condemned in this case after the boundaries of the Recreation Area had been set.[1] The parcel held by petitioner lies within those boundaries (Tr. 352, 373-374) and is completely surrounded by government-owned land (Tr. 267-268).

The United States instituted this eminent domain proceeding on October 15, 1976, pursuant to 40 U.S.C. 257. Title and possession of the property has at all times remained in petitioner. Petitioner filed a counterclaim for inverse condemnation (C.R. 6, 34, 38),[2] asserting that the government had taken its land by denying access across government land acceptable to the company (C.R. 6, at 7). Petitioner requested just compensation and interest from 1966.[3] The magistrate granted the government's motion to dismiss this counterclaim and the district court upheld the order (C.R. 20, 32, 43).

Two trials were held in this case. The first trial resulted in a judgment of $880,000, using a valuation date of March 1980 (C.R. 99). Thereafter, the district court granted the government's motion for a new trial (498 F. Supp. 763 (D. Nev. 1980)), finding that the jury award was erroneously based upon use of the land for gambling, a use prohibited on privately owned lands within federal park areas (36

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[1]The actual date of acquisition is unclear. Petitioner states in its petition (Pet. 3) that it began acquisition in 1966, and petitioner's president so testified (Tr. 75-76). At trial in April 1983, petitioner's counsel stated that the 320-acre tract here at issue was purchased 13 or 14 years previously (Tr. 67, 236). In any event, it is undisputed that the acquisition began no earlier than 1966.

[2]"C.R." refers to the clerk's record in the court of appeals.

[3]See note 1, *supra*.

C.F.R. 2.15 (1982)).[4] At the second trial, the jury set just compensation at $991,628 (Pet. App. A3), based on residential and light commercial use of the land (Tr. 96, 275). The valuation date was April 5-6, 1983, the date of trial (Tr. 245, 277-278).

In addition to the jury's award, petitioner sought an award of interest from October 15, 1976, the date the complaint was filed (Tr. 226). The district court denied this claim (Tr. 256, 367) and petitioner appealed.

After briefs were filed, the court of appeals granted the government's motion to defer consideration of the case pending this Court's decision in *Kirby Forest Industries, Inc.* v. *United States,* No. 82-1994 (May 21, 1984). Following the decision in that case holding that no interest is due before the government takes possession of the property in a typical straight condemnation case, the United States filed a motion for summary affirmance, which the court of appeals granted (Pet. App. A1-A2). Petitioner seeks review of that decision.

ARGUMENT

The decision of the court of appeals correctly applied *Kirby Forest Industries, Inc.* v. *United States, supra,* does not conflict with any other decision of this Court or any other court of appeals, and does not warrant further review.

Petitioner cites four instances of alleged governmental control over its land, seeking to bring its case outside the purview of the rule enunciated in *Kirby Forest Industries* last Term. None of these contentions is well founded.

1. Petitioner first asserts (Pet. 6) that by filing a notice of *lis pendens,* the government exerted control over its

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[4]This regulation is currently codified at 36 C.F.R. 2.36.

property.[5] The petitioner in *Kirby Forest Industries* pressed the identical argument and this Court flatly rejected it (slip op. 11-14). It is thus clear that a notice of *lis pendens*, which is simply a notice of pending litigation (*Allstate Finance Corp.* v. *Zimmerman*, 272 F.2d 323, 325 (5th Cir. 1959)), does not, of itself, constitute a taking.

2. Petitioner next contends (Pet. 6, 8) that 36 C.F.R. 2.15 (1982), which prohibits gambling inside the boundaries of the Recreation Area, effected a taking of its land. Petitioner argues that but for the regulation, the highest and best use of its propery would have been gambling. Prohibition of the assertedly more valuable use of gambling constituted a taking, in petitioner's view. This argument ignores the fact that the cases "uniformly reject the proposition that diminution in property value, standing alone, can establish a taking." *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 131 (1978). This Court has refused to find takings where the value of property has been diminished by as much as 75%, *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926), and 87½%, *Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915). As the Court wrote in *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 592 (1962):

> If [an] ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it [an] unconstitutional [taking].

Thus, there is no merit to petitioner's argument that the prohibition of gambling on its property constituted a taking.

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[5]Of course, if petitioner were correct that the property was taken when the *lis pendens* notice was filed in 1976, the jury award of $991,628, which was based on land values at the date of the trial in 1983, would have to be set aside, and a new figure set based on 1976 values. There is no theory under which petitioner would be entitled both to the value of the land in 1983 and to interest on that value from 1976.

3. Petitioner also alleges (Pet. 5-6) that the United States took the property through a policy of immediately filing a declaration of taking when an owner of land involved in a straight condemnation case threatens to improve the land. Once again, this argument was conclusively rejected by this Court last Term in *Kirby Forest Industries* (slip op. 14):

> It is true that any effort by petitioner to develop the land probably would have prompted the Government to exercise its authority, under 40 U.S.C. § 258a, to file a declaration of taking and thereby peremptorily to appropriate the tract in order to protect it from alteration. But the likelihood that the United States would have responded in that fashion to an attempt by petitioner to make productive use of the land weakens rather than strengthens petitioner's position, because it suggests that petitioner had the option, at any time, to precipitate an immediate taking of the land and to obtain compensation therefor as of that date, merely by informing the Government of its intention to cut down the trees.

Similarly in this case, if, as petitioner contends (Pet. 2), "federal officials watched the property as though it were already federally owned," petitioner could have precipitated an immediate taking by any actions suggesting an intent to develop it.[6]

Moreover, in considering whether a taking has occurred, one factor considered by the courts is whether the government has interfered with reasonable investment-backed expectations. *Prune Yard Shopping Center* v. *Robins*, 447

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[6]Contrary to petitioner's contention (Pet. 5), there was no need for it to "expend the large sums required to plan development of the 320 acres" before it took steps that would precipitate a taking. Instead, here as in *Kirby Forest Industries*, notice of an intent to cut trees would probably have been sufficient.

U.S. 74, 83 (1980). In this case, petitioner could have had no reasonable investment-backed plans to develop its property. When petitioner purchased the land, it knew it was buying a landlocked parcel located within the boundaries of the Lake Mead National Recreation Area. 16 U.S.C. 460n-1. In the statute creating the area, Congress expressly provided that the Secretary could procure land within the area "in such manner as he shall consider to be in the public interest." *Ibid.* Thus, as in *Ruckelshaus* v. *Monsanto Co.*, No. 83-196 (June 26, 1984), in light of the statute in existence at the date of purchase, petitioner could not reasonably have expected to develop this land.

4. Petitioner's final allegation (Pet. 6, 8) of the exercise of federal dominion over its land concerns two citations for trespass.[7] What petitioner has failed to reveal, however, is that the citations were issued for trespass on the government-owned land surrounding petitioner's land.[8] The government's protection of its own land can scarcely amount to a taking of petitioner's land.

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[7]The citations eventually were cancelled and no fines were ever collected for the violations.

[8]Two men drove a Caterpillar tractor off a road and across government-owned property, thereby destroying natural vegetation, even though they could have reached petitioner's property without leaving the road. Copies of the citations were never formally offered into evidence at trial; we are lodging the Park Service's case incident report, and a map showing the area involved, with the Clerk of this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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